OCTOBER TERM, 1974
No. 74-134

SEP 16 1974
MICHAEL RODAK, JR., CLE

LOWELL F. HOLSAPPLE, a Minor, by His Father and Next Friend,
Frank Holsapple,
Respondent,

vs.

RAYMOND D. WOODS, Individually and as Superintendent of the Odin Community Unit School District No. 700; KERMIT K. CUNNINGHAM, Individually and as Principal of Odin High School; THE BOARD OF EDUCATION, Odin Community Unit School District No. 700, County of Marion, State of Illinois, a Body Politic Corporate; PLES WILSON, Individually and as President of the Board of Education; ROBERT UCHITJIL, Individually and as Member of the Board of Education, Odin Unit No. 700; BILL JACKSON, Individually, and as Member of the Board of Education, Odin Unit No. 700; VIRGIL STEELE, Individually, and as Member of the Board of Education, Odin Unit No. 700; JACK BRANCH, Individually and as Member of the Board of Education, Odin Unit No. 700; EARL VAUGHN, Individually and as Member of the Board of Education, Odin Unit No. 700; LAWRENCE HAYDEN, Individually, and as Member of the Board of Education, Odin Unit No. 700,
Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Seventh Circuit

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JOHN C. O'BRIEN
LAND OF LINCOLN LEGAL
ASSISTANCE FOUNDATION, INC.
234 COLLINSVILLE AVENUE
EAST ST. LOUIS, ILLINOIS 62201

Counsel for Respondent

Page

Statement 1

Reasons for Denying the Writ 3

I. Mootness 3

II. Petitioners' "Conflicts" are Distinguishable 4

III. Trend Toward Allowing Personal Choice 6

IV. Consistent with Tinker 8

V. The Right of Personal Privacy 9

VI. Petitioners Fail to Satisfy the Burden of Proof Test they Propose 12

Conclusion 13

Certificate of Service 14

LIST OF CASES CITED

Bishop v. Colaw, 450 F. 2d 1069, 1075 (8th Cir. 1971) p.9

Breen v. Kahl, 419 F. 2d 1034, 1036 (7th Cir. 1969) cert. denied, 398 U.S. 937 (1970 p.9, 10, 11

Crews v. Cloncs, 432 F. 2d 1259, 1266 (7th Cir. 1970) p. 10

DeFunis v. Odegaard, ___U.S. ____, ____, 42 U.S.L.W. 4578, 4578-79 (Apr. 23, 1974) p. 3

Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973) p.7,8

Fagan v. National Cash Register Co., 481 F. 2d 1115 (D.C. Cir. 1973) p.8

Ferrell v. Dallas Indep. School Dist., 392 F. 2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968 p. 4,11

Freeman v. Flake, 448 F. 2d 258, 262 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972) p. 6,11

Friedman v. Froehlke, 470 F. 2d 1351 (1st Cir. 1972) p.8

Gere v. Stanley, 453 F. 2d 205, 209 n. 8 (3rd Cir. 1971) p.4

Gfell v. Rickelman, 441 F. 2d 444 (6th Cir. 1971) p.5

Jackson v. Dorrier, 424 F. 2d 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970) p.11

Karr v. Schmidt, 460 F. 2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972) p.7,11

King v. Saddleback Jr. College Dist., 445 F. 2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971) p.5,11

Lansdale v. Tyler Jr. College, 470 F. 2d 659 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1973) p.7,11

New Rider v. Board of Educ. of Indep. School Dist. No. 1, 480 F. 2d 693 (10th Cir.), cert. denied, 414 U.S. 1097 (1973) p.11

Richards v. Thurston, 424 F. 2d 1281, 1284-85 (1st Cir. 1970) p.10

Rinehart v. Brewer, 491 F. 2d 705 (8th Cir. 1974) (prisoners) p.7

Roe v. Wade, 410 U.S. 113, 152-53 (1973) p.10

Sherling v. Townley, 464 F. 2d 587, 588-89 (5th Cir. 1972) p.9

Stevenson v. Board of Educ. of Wheeler County, 426 F. 2d 1154 (5th Cir.), cert. denied, 400 U.S. 957 (1970) p.11

Stull v. School Bd. of the Western Beaver Jr. - Sr. High School, 459 F. 2d 339, 347 (3d Cir. (1972) p.4

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) p.8

Van Hoose v. Eidson, 450 F. 2d 746 (6th Cir. 1971) p. 4

Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535 (5th Cir. 1973) p.7,8

STATEMENT

Respondent accepts petitioners' Statement subject to the following qualifications and additions:

Respondent was a senior at Odin High School when this suit was filed. Pursuant to a stipulation approved by the District Court on September 25, 1973, respondent was re-admitted to Odin High School and has since graduated.

Petitioner Woods admitted on cross-examination that students could conform to the grooming rule by either cutting their hair or wearing it in a fashion that complied with the rule, i.e., not over eyebrows or ears or to the collar. (Tr. 30-31).

The study made by Ruth Westerhold was, according to her own testimony, an "informal survey." (Tr. 71). This survey consisted of going through the yearbooks of seven area high schools and picking the four male students with the longest hair on the days the pictures

were taken. One of these twenty-eight men was third in his class of 110 and the rest ranked in the lower three-quarters of their class. (Tr. 71-73).

No evidence was presented by petitioners' witnesses as to how long hair itself caused discipline problems and/or adversely affected the educational process at Odin High School. District Court's findings of fact 17, 18, 20-23. (Petitioners' Brief at A-5)

REASONS FOR DENYING THE WRIT

I. MOOTNESS

The first reason for denying the writ is that this litigation is now moot. As this Court recently re-stated in DeFunis v. Odegaard, ___ U.S. ___, ___, 42 U.S.L.W. 4578, 4578-79 (Apr. 23, 1974):

> The starting point for analysis is the familiar proposition "that the federal courts are without power to decide questions that cannot affect the rights of the litigants before them." ... The inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." ... [T]he fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction."

As in DeFunis, the plaintiff below did not cast his suit as a class action. He sought only individual relief, which was granted, and has since graduated from high school. Therefore, any decision by this Court will be irrelevant in this dispute between

petitioners (hereinafter referred to as the School Authorities), and respondent. See also Van Hoose v. Eidson, 450 F. 2d 746 (6th Cir. 1971).

II. PETITIONERS' "CONFLICTS" ARE DISTINGUISHABLE

The School Authorities also state that there is a conflict between the circuits and cite several cases in which hair-length regulations have been upheld. These cases are distinguishable. Less than four months after the Third Circuit found that it was not "faced squarely with the underlying constitutional issue," Gere v. Stanley, 453 F. 2d 205, 209 n. 8 (3rd Cir. 1971), that court held:

> that the governance of the length and style of one's hair is implicit in the liberty assurance of the Due Process Clause of the Fourteenth Amendment.

Stull v. School Bd. of the Western Beaver Jr.-Sr. High School, 459 F. 2d 339, 347 (3d Cir. 1972). The Fifth Circuit, in Ferrell v. Dallas Indep.

School Dist., 392 F. 2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968), assumed "that a hair style is a constitutionally protected mode of expression," Ferrell at 702, but found that there was a compelling state interest "in maintaining an effective and efficient school system," Ferrell at 703. In Gfell v. Rickelman, 441 F. 2d 444 (6th Cir. 1971) the district court had found a reasonable basis for the regulation which the court of appeals found supported by the evidence. Gfell at 446-47. In the instant case, however, both the district court and the court of appeals below found no state interest in the length of hair. Petitioners' Brief at A-2, A-5, A-9. In King v. Saddleback Jr. College Dist., 445 F. 2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971), the school authorities submitted affidavits in which the school official-affiants expressed their opinions that hair length interferes with the educational process. King at 939. The trial court below

heard testimony of like effect, but found it unconvincing. District Court's findings of fact 17, 18, 20-23; Petitioners' Brief at A-5. The final case cited by the School Authorities never reached the validity of the regulations because it held that the complaints failed to state a cause of action. Freeman v. Flake, 448 F. 2d 258, 262 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972).

III. TREND TOWARDS ALLOWING PERSONAL CHOICE

In all, nine courts of appeals have considered whether school authorities may constitutionally regulate the length of hair. Five circuits, the First, Third, Fourth, Seventh and Eighth, have found that high school students have a constitutional right to choose their own hair styles while four circuits, the Fifth, Sixth, Ninth and Tenth, have held they do not. Of the remaining two circuits, one has followed the majority's reasoning in finding that police officers also have a right to choose their own

hair styles. Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973). It is not clear whether the circuits in the minority will continue to abide by their previous positions. This is especially true in the Fifth Circuit which, in two en banc decisions has held that college students have a constitutionally protected right to wear long hair while high school students do not. Compare Lansdale v. Tyler Jr. College, 470 F. 2d 659 (5th Cir. 1972), cert. denied, 411 U.S. 986 (1973) with Karr v. Schmidt, 460 F. 2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972). In addition, one panel in that circuit has found that private employers may not discriminate against long haired men. Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535 (5th Cir. 1973).

The legal battle against hair length regulation no longer focuses on the school house. The more recent cases focus on governmental regulation of adult hair styles, see, e.g., Rinehart v. Brewer, 491 F. 2d 705 (8th

Cir. 1974) (prisoners); Dwen v. Barry, 483 F. 2d 1126 (2d Cir. 1973) (policemen); Friedman v. Froehlke, 470 F. 2d 1351 (1st Cir. 1972) (national guardsmen), and private employment practices, compare Willingham v. Macon Telegraph Publishing Co., 482 F. 2d 535 (5th Cir. 1973) with Fagan v. National Cash Register Co., 481 F. 2d 1115 (D.C. Cir. 1973).

IV. CONSISTENT WITH TINKER

The School Authorities also suggest that both lower courts misconstrued this Court's decision in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). But as the passage they quote states, Petitioners' Brief at 7-8, that case concerned the suppression of a political protest by school authorities. Furthermore, they have ignored a pertinent portion of that opinion:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under

> our Constitution. They are possessed of fundamental rights which State must respect, just as they themselves must respect their obligations to the State.

Tinker at 511. See also Breen v. Kahl, 419 F. 2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970).

V. THE RIGHT OF PERSONAL PRIVACY

Unlike a regulation governing the dress of students, a hair length regulation operates twenty-four hours a day, seven days a week, for most of the year. Because it is not possible to accomodate the desires of both the school and the student, one must give way. On pain of forfeiting his free public education, the student is forced to comply with a school regulation when school is not in session. This interference with personal liberty has been held to violate the protections of the Ninth Amendment, Bishop v. Colaw, 450 F. 2d 1069, 1075 (8th Cir. 1971), the Equal Protection Clause of the Fourteenth Amendment, Sherling v.

Townley, 464 F. 2d 587, 588-89 (5th Cir. 1972) (Senior Judge Tuttle specially concurring) (classification based on length of hair); Crews v. Cloncs, 432 F. 2d 1259, 1266 (7th Cir. 1970) (classification based on sex), the Due Process Clause of the Fourteenth Amendment, Richards v. Thurston, 424 F. 2d 1281, 1284-85 (1st Cir. 1970), and somewhere within the penumbra of the First or Ninth Amendments, Breen v. Kahl, 419 F. 2d 1034, 1036 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970). These decisions are consistent with this Court's recognition that the right of personal privacy has many bases. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

While this Court has admonished the Bar on numerous occasions that a denial of a petition for writ of certiorari is not to be taken as an expression on the merits, this Court has had nine opportunities in the last six years to consider the constitutional questions presented by the School Authorities. This Court has found each petition to be not worthy of the grant of certiorari

without regard to which side filed the petition. New Rider v. Board of Educ. of Indep. School Dist. No. 1, 480 F. 2d 693 (10th Cir.), cert. denied, 414 U.S. 1097 (1973); Lansdale v. Tyler Jr. College, 470 F. 2d 659 (5th Cir. 1972) (en banc), cert. denied, 411 U.S. 986 (1973); Karr v. Schmidt, 460 F. 2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972); Freeman v. Flake, 448 F. 2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Jr. College Dist., 445 F. 2d 932 (9th Cir. 1970), cert. denied, 404 U.S. 979 (1971); Stevenson v. Board of Educ. of Wheeler County, 426 F. 2d 1154 (5th Cir.), cert. denied, 400 U.S. 957 (1970); Jackson v. Dorrier, 424 F. 2d 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970); Breen v. Kahl, 419 F. 2d 1034 (7th Cir. 1969), cert. denied, 398 U.S. 937 (1970); Ferrell v. Dallas Indep. School Dist., 392 F. 2d 697 (5th Cir.), cert. denied, 393 U.S. 856 (1968).

VI. PETITIONERS FAIL TO SATISFY THE BURDEN OF PROOF TEST THEY PROPOSE

Even if the School Authorities were to prevail on the constitutional question they present, both the trial court and the court of appeals below have found no evidence to support the regulation. Petitioners' Brief at A-2, A-9 to A-10. Thus they could not meet the rational relationship test they propose. Petitioners' Brief at 9-10. This is demonstrated by Petitioner Woods testimony that long haired men could comply with the regulation by styling their hair so that it did not cover the eyebrows, ears or collar. It strains credibility to contend that an undisciplined long haired student can be transformed into a model student by combing his hair out of his eyes. As the trial court below stated:

> More fundamentally, Defendants failed to show how long hair could cause academic or discipline problems. The basic premise observed by several of the witnesses was that most students with academic or discipline problems wore long hair. It does not logically follow that most students with long

> hair are academic or discipline problems, nor that long hair causes these problems. ... None of the witnesses suggested that forcing a student to cut his hair short will cause his grades to improve or his attitude to change.

Petitioners' Brief at A-2. This was reiterated by the court in its findings fact 17, 18, 20-23. Petitioners' Brief at A-5. The court of appeals below found the School Authorities' challenge to these findings "to be without merit." Petitioners' Brief at A-9.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

JOHN C. O'BRIEN
LAND OF LINCOLN LEGAL ASSISTANCE FOUNDATION, INC.
234 COLLINSVILLE AVENUE
EAST ST. LOUIS, ILLINOIS 62201
(618) 271-9140

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on each adverse party this 16th day of September, 1974 by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record as follows: Glenn E. Moore, 1007 Broadway, Mt. Vernon, Illinois 62864, Counsel for Petitioners.

John C. O'Brien

JOHN C. O'BRIEN